

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93-278

In the Matter of)	
)	
Implementation of the Cable Television)	
Consumer Protection and Competition)	MM Docket No. 92-259
Act of 1992)	
)	
Broadcast Signal Carriage Issues)	
)	
Reexamination of the Effective)	
Competition Standard for the)	MM Docket No. 90-4
Regulation of Cable Television)	
Basic Service Rates)	
)	
Request by TV 14, Inc.)	
to Amend Section 76.51 of the)	MM Docket No. 92-295
Commission's Rules to Include)	RM-8016
Rome, Georgia, in the Atlanta,)	
Georgia, Television Market)	

ORDER

Adopted: May 26, 1993

; Released: May 27, 1993

By the Commission:

1. On March 11, 1993, the Commission adopted a Report and Order¹ in this proceeding to implement the mandatory television broadcast signal carriage ("must-carry") and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act").² By this Order, the Commission denies a Petition of the National Cable Television Association for a Stay Pending Reconsideration or, Alternatively, Pending Review and a Request for Stay submitted by Yankee Microwave, Inc.³ Both petitions request that the Commission stay the effective date of specific provisions of the new rules until consideration of the petitions for reconsideration.

¹ Report and Order in MM Docket No. 92-259, 58 FR 17350 (April 2, 1993).

² Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

³ On May 10, 1993, the Commission received an Opposition of the National Association of Broadcasters and the Association of Independent Television Stations, Inc. to the Petition of National Cable Television Association for a Stay Pending Reconsideration, or Alternatively Pending Review.

2. NCTA Petition. In its May 3, 1993, petition, the National Cable Television Association ("NCTA") seeks a postponement of the requirement that cable operators add stations to come into compliance with the new must-carry rules. Specifically, NCTA seeks to postpone the application of the rules from June 2 until October 6 or the date a decision on reconsideration becomes effective, whichever is earlier. During this period, NCTA would require continued carriage of any must-carry eligible station that was carried on the date the stay is issued. NCTA argues that the Commission implementation schedule for its new must-carry/retransmission consent rules exceeds the requirements mandated by Congress, which only required that the new rules be issued within 180 days of enactment of the 1992 Act, and will impose unnecessary burdens on cable operators. In particular, NCTA asserts that cable operators may be required to change their channel line-ups three times in five months: (1) on June 2; (2) at some interim point when a station resolves a signal quality or copyright liability issue or is declared "local" for must-carry purposes by the Commission; and (3) on October 6.

3. NCTA also states that there is a need to resolve several of the issues it raises in its petition for reconsideration before cable operators begin carriage of must-carry signals. These issues include a revised definition of "substantial duplication;" a time limit for broadcasters' must-carry demands; and several changes to the provisions regarding the carriage of retransmission consent signals, such as the manner of carriage, that may affect negotiations between cable operators and broadcast licensees. NCTA contends that if changes are made to these aspects of the rules when the Commission acts on the reconsideration petitions, the requested relief may come too late for cable operators that may have already dropped cable programming services to meet their must-carry obligations. NCTA claims that, under this implementation schedule, the balance of hardship falls on cable operators since the vast majority of broadcast stations have been carried voluntarily by cable systems in the absence of must-carry rules. NCTA states that at most some broadcast station may have to wait a few months before gaining carriage. The petitioner argues that these broadcasters have not suffered harm in the past and, unlike the non-broadcast programming services that they will displace on cable systems, can be viewed by consumers over-the-air. Finally, NCTA asserts that the current implementation schedule is likely to cause confusion and be disruptive for subscribers.

4. In their opposition, the National Association of Broadcasters and the Association of Independent Television Stations ("NAB/INTV") argue that the petition should be denied because of NCTA's delay in seeking relief until after the first implementation date (April 2) and on the date of the first affirmative obligation for cable operators (May 3). NAB/INTV state that NCTA fails to demonstrate that it is likely to succeed on the merits since the requested changes to the rules have already been considered and rejected. According to petitioners, the claimed injuries to cable operators are speculative and have been considered and rejected by both the District Court and the Supreme Court. These parties assert that if the stay were granted, the balance of hardships would shift to broadcasters and the public. NAB/INTV contend that the Commission should compare NCTA's claims of inconvenience to some number of systems to the economic and other losses non-carried stations would suffer from the delay of enforcement of their statutorily guaranteed

carriage rights. Furthermore, NAB/INTV assert that a delay of the implementation dates would harm the public interest by depriving cable subscribers of signals that Congress has determined advance the public interest and would place additional, unnecessary burdens on the Commission to develop a new schedule.

5. We deny NCTA's petition for stay. The Commission's concern with the development of an appropriate implementation schedule that would balance the interests of all parties in the time frame set forth by Congress began with the Notice of Proposed Rule Making in this docket.⁴ Based on the comments in response to the Notice, the Commission adopted a timetable that balances the interests of broadcast stations and cable systems, that fulfills the requirements of the 1992 Cable Act, that attempts to implement the statute promptly and that endeavors to minimize disruption in an area where disruption is inevitable.⁵ Specifically, as stated in the Report and Order, we believe that Congress intended for us to implement the must-carry provisions without delay.⁶ In addition, several implementation dates were selected to accommodate the October 6 date for commencement of retransmission consent and the necessary actions, such as notifications, that must be taken prior to that time.⁷

6. The Commission was aware that one consequence of its implementation schedule might be that a cable operator could be required to change its system's channel line-up more than once in less than a year. To minimize the extent of such reshuffling, we chose the effective date for channel positioning to coincide with October 6, 1993, effective date for carriage of stations pursuant to retransmission consent agreements. Thus, under the established schedule, must-carry signals currently carried can remain in place on their existing channel positions until October, and stations that are added can be positioned at the convenience of the cable operator.⁸ We do not find that NCTA has provided evidence to support its claim that the impact of this timetable on cable operators and programmers outweighs the carriage rights that Congress conferred upon broadcast licensees. Indeed, as the legislative history of the 1992 Act indicates, Congress determined that broadcast stations have experienced harm since the Commission's must-carry rules were invalidated and that statutorily-mandated carriage provisions were a necessary remedy.⁹ This

⁴ See Notice of Proposed Rule Making in MM Docket No. 92-259, 7 FCC Rcd 8055 at 8066-8067 (1992).

⁵ See Report and Order at paras. 149-157.

⁶ See Report and Order at para. 153.

⁷ See Report and Order at paras. 152, 155-156.

⁸ See Report and Order at paras. 88, 154.

⁹ See Section 2(a)(16) of the 1992 Cable Act. See also Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 92, 102 Cong., 1st Sess. (1991) (Senate Report) at 41-46.

finding was upheld by the three judge panel of the District Court.¹⁰ Furthermore, and most importantly, NCTA has not demonstrated irreparable injury. The assertion of harm to cable systems alleged by NCTA is unsupported by facts and contradicts NCTA's claim that cable operators are already carrying most of the television stations that are entitled to must-carry status. We should note that Congress determined that subscribers have experienced channel line-up changes before at cable operators' sole discretion and acted to reduce this practice. Finally, the 30-day notice provisions of our rules will ensure that cable subscribers are aware of such occurrences well before they take place.¹¹ Accordingly, we believe that NCTA has not met the requirements for a stay.¹²

7. Yankee Petition. On May 3, 1993, Yankee Microwave ("Yankee") filed a Request for Stay of the effective date of the retransmission consent rules, specifically the rule concerning the superstation exemption.¹³ Yankee contends that the new rules unfairly provide an exemption from the retransmission consent requirements for superstations delivered via satellite, but not the same signals delivered by microwave or other video distribution systems. Yankee, which is a microwave deliverer of such signals, claims that cable systems have already notified it of their intent to switch to satellite delivery of superstations in order to avoid the need to get retransmission consent for carriage of these signals. Yankee argues that there is no reason to prefer satellite delivery of such signals over microwave carriers and that the legislative history indicates that Congress intended to grandfather all qualified superstations. The petitioner asserts that it will suffer irreparable injury if the stay is not granted and that a brief stay will not harm the superstations or the small percentage of cable systems that receive superstations via microwave. Finally, Yankee asserts that the purpose of the 1992 Act is to promote competition in the video marketplace and protect consumers from monopoly rates and anti-competitive practices. The rule as written, according to Yankee, is contrary to that goal.

8. At issue in Yankee's request for stay is the superstation exemption, a part of the retransmission consent rules which will not affect the offering of cable service until October 6, 1993. Thus, the Commission has sufficient time to consider and rule on this issue in its Order addressing the reconsideration petitions and associated pleadings received in this proceeding prior to that effective date. Moreover, the evidence provided by Yankee regarding the extent to which signals will be delivered by satellite instead of

¹⁰ Turner Broadcasting Systems, Inc. v. Federal Communications Commission, No. 92-2247, slip op. at 14-15 (D.D.C. April 8, 1993), appeal pending, No. A-798 (U.S., filed April 19, 1993).

¹¹ 47 C.F.R. §§ 76.58(a) and 76.309(c) (3) (A) (2).

¹² See generally Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977).

¹³ 47 C.F.R. § 76.64(b) (2).

microwave is speculative and it is unclear whether cable systems will actually change the delivery system used to receive such signals.¹⁴ Accordingly, Yankee has not demonstrated that a stay is needed to avoid irreparable harm during this interim period. Therefore, we deny Yankee's motion for stay.

9. Accordingly, IT IS ORDERED pursuant to Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j) and 303(r), that the Petition of the National Cable Television Association for a Stay Pending Reconsideration or, Alternatively, Pending Review and the Request for Stay submitted by Yankee Microwave, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

¹⁴ In a May 6, 1993, supplement to its petition for reconsideration, Yankee cites one possible situation where a satellite provider is contacting cable systems in this regard.